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No. 83-714

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF DUNCANVILLE, TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In this condemnation action the United States acquired a landfill site formerly owned by petitioner. In the district court the United States asserted that just compensation should be measured by the fair market value of the property taken, while petitioner claimed that its actual expenses in acquiring a substitute facility are the measure of compensation due. The district court submitted the case to the jury on the alternative theories, and then entered judgment based on the fair market value of the property. The court of appeals reversed, holding that the cost of substitute facilities was the proper measure of damages, but declined to direct entry of judgment based upon the jury's alternate verdict. Instead, because it concluded that the jury instructions given respecting the substitute facilities cost measure were erroneous, the court of appeals remanded for retrial.

The question presented by the present petition is: whether, given the procedural history of this case, the court of appeals had authority to consider the adequacy of the district court's instructions defining the substitute facilities cost measure of compensation and to remand for retrial, rather than directing entry of judgment on the basis of the jury's alternate verdict.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 706 F.2d 1356. The district court's opinion (Pet. Supp. App. 1-8) is reported at 529 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21) was entered on June 13, 1983. Timely petitions for rehearing were denied on September 19, 1983 (see Pet. App. A22-A23). The petition for a writ of certiorari was filed on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT*

1. The United States commenced this action on October 3, 1978, by filing a complaint in condemnation, coupled with a declaration of taking, pursuant to 40 U.S.C. 258a, in the United States District Court for the Northern District of Texas. The site acquired was a 50-acre sanitary landfill, owned by petitioner, the City of Duncanville, Texas, used for the purpose of disposal of regular garbage collections. The site was needed by the United States to accommodate the United States Army Corps of Engineers Lakeview Lake flood control project (subsequently renamed the Joe Pool Lake flood control project). As estimated compensation, the United States paid $199,950 into the registry of the court, which was subsequently paid over to petitioner. Pet. App. A5 & n2.

The landfill site had been operated by petitioner for that purpose since 1969; since 1977, the City had operated its landfill under a state permit (Tr. 69-71). At the date of taking, approximately 15 acres of petitioner's landfill had been filled with waste and approximately five acres of the total area were unusable for landfill because of the presence of a creek (Pet. App. A15 & n.8; Tr. 85). Approximately 313,000 cubic yards of the landfill's capacity had been used, and the remaining capacity was 650,000 cubic yards, an amount that gave it an expected lifetime of 12.8 years (Pet. App. A15; Tr. 383-388, 398). Immediately adjacent to petitioner's landfill was a privately owned landfill on a 64.28 acre tract, which had also been acquired by the United States (Tr. 211-213, 345, 352).

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* This statement is essentially identical to the statement of the case embodied in our own petition for a writ of certiorari, *United States* v. *50 Acres of Land*, No. 83-____, filed contemporaneously with this brief in opposition, and is reproduced here for the convenience of the Court. As explained below (page 16 note 13), the question presented by the City of Duncanville's petition is essentially unrelated to the question presented by our own petition.

Following the United States' acquisition of petitioner's landfill site, petitioner acquired a new landfill facility, consisting of 113.7 acres, at a site approximately the same driving time from Duncanville as the prior facility. According to the uncontradicted testimony of an expert geologist at trial, more favorable soil and water-table conditions at the new site made it a better landfill location than the former site; the new site could be excavated to a depth of 20 feet, twice the usable depth of the former landfill. The usable capacity of petitioner's new site was 2,100,000 cubic yards, giving it an expected lifetime of 41.6 years. The residual capacity of the former site thus was only 38.8% of the capacity of the replacement landfill. Pet. App. A5, A15; Tr. 397-399.

2. a. Prior to trial, a dispute emerged between the parties as to the proper measure of just compensation. The government contended that fair market value was the applicable standard; petitioner maintained that it was entitled to recover the cost to the City of acquiring, improving and putting into operation its substitute facility, which it claimed amounted to more than $1,276,000 (see Pet. App. A17 n.10). In order to resolve this dispute as to the proper measure of compensation, the government filed a motion in limine, requesting that the court limit the evidence to be received at trial to evidence relating to the fair market value of the property, and that all evidence as to the cost of reproducing the property taken or acquiring a substitute facility be excluded (R. 62-79). This motion was denied (R. 111), the district court noting that in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 509 n.3 (1979) (*Lutheran Synod*), this Court had reserved the question whether a substitute facilities measure of compensation is appropriate when publicly owned property is taken. The district court reasoned that "a complete factual record should be developed from which an inde-

pendent determination of the appropriate measure of compensation can be made" (R. 111).

b. The issue of just compensation was then tried to a jury. Both parties presented testimony as to the fair market value of the property taken. Appraisers who testified for the government and those testifying for petitioner agreed that a distinct market existed for landfill properties in the vicinity of Duncanville, and that the fair market value of the condemned site was readily ascertainable by reference to sales of other, comparable, landfill properties in the area. See Pet. App. A9; Pet. Supp. App. 5-6.[1]

In addition, over the government's continuing objection (R. 151-152), petitioner presented the testimony of Robert B. Lee, Duncanville's Director of Public Works, that the aggregate cost of acquisition and preparation of the substitute landfill site established by the City was $1,276,311.76 (Tr. 78). Lee's testimony indicated that although petitioner has the power of eminent domain it did not attempt to acquire a landfill site comparable in size to its former site, and that petitioner did not have the new landfill site it purchased appraised prior to making its negotiated purchase and did not bargain with the vendor over the price (Tr. 91-94). The testimony of the government's appraisers indicated that the amount paid by petitioner to purchase its substitute site was substantially in excess of the fair market value

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[1] The government's witnesses all testified that a market for landfills existed in the area, and testified to fair market value appraisals of petitioner's landfill site ranging from $160,410 to $190,000, based upon comparable sales data (Tr. 208, 218-229, 249-250, 276, 295-297, 298-310, 345-353, 360). Appraisers Carl Mash and R. Edwin White, who testified for petitioner, agreed that a market existed for landfill properties in the area, and, based upon comparable sales, offered valuation appraisals of $370,000 and $367,583, respectively (Tr. 140, 173-178, 182, 189-190).

of that site (Tr. 273, 282, 319-321, 357). The United States moved to strike Lee's testimony, on the ground that it was not probative of the value of a reasonably necessary substitute facility (Tr. 433-434). The court denied the government's motion (Tr. 435).

c. At the close of the evidence, the district court submitted the case to the jury, directing the jury to respond to special questions. Through these questions, the jury was asked to determine both the fair market value of petitioner's landfill on the date of taking, and the cost to petitioner of establishing a substitute landfill.[2] The government objected unsuccessfully to submission of the substitute facilities issue to the jury (Tr. 499-500; see also R. 151-152), while petitioner objected unsuccessfully to submission of the fair market value question (Tr. 499-500). The jury returned a verdict of $225,000 based upon the fair market value standard, and an alternative verdict of $723,654.01 as the cost of substitute facilities (Pet. App. A6).

d. Each party moved for entry of judgment based upon the verdict reflecting the measure of compensation it advocated (R. 203, 223). The district court entered judgment against the United States in the amount of the fair market value of the property taken,

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[2] The jury was instructed (Pet. App. A16):

> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constitutents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Simply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

as determined by the jury ($225,000) plus interest at the rate of 6% due upon the deficiency in the estimated compensation previously paid by the United States.[3]

The district court held, initially, that petitioner "did not meet its burden of establishing what would be a reasonable cost of a substitute facility" (Pet. Supp. App. 3). The court noted that petitioner's evidence reflected only its actual costs in acquiring and developing its new landfill site, which was much larger than the facility being replaced, and had more unused capacity. The court also suggested that the evidence indicated that the purchase price paid by petitioner was excessive. Pet. Supp. App. 2-3.

The district court also held that, even if the evidence supported a finding as to the reasonable cost of an equivalent facility, the fair market value standard was the proper measure of just compensation, where, as here, a market for property of the kind taken exists, and market value is ascertainable (Pet. Supp. App. 3-6). Noting that fair market value is ordinarily the proper measure of compensation, the court found that neither of the exceptions to that rule recognized by this Court in *Lutheran Synod*, 441 U.S. at 513, was applicable (*ibid.*). The court observed, first, that here, unlike cases involving taking of streets or sewers or other local government property for which no market exists, or for which the market is so thin as to make comparable sale data unreliable, the record established that the fair

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[3] The district court assumed that, as petitioner contended, the 6% interest rate on such deficiencies prescribed by the Declaration of Taking Act, must be regarded as a floor, rather than a ceiling, on the interest to be awarded, lest the discrepancy between the statutory rate and a market interest rate render the statute unconstitutional (Pet. Supp. App. 6-7). But because petitioner had presented no evidence from which an appropriate interest rate could be determined, the court declined to award interest in excess of the statutory rate (*id.* at 7-8).

market value of the property taken was readily ascertainable (*id.* at 4-6). Second, the court determined that compensation based upon fair market value placed petitioner "in as good a position pecuniarily as if its property had not been taken" and that an award based upon fair market value accordngly "does not impermissibly deviate from the indemnity principle" (*id.* at 6). The court also noted that the fair market value standard is a desirable one because it provides a relatively objective measure of compensation due (*id.* at 3).

3.a. The court of appeals reversed and remanded for further proceedings (Pet. App. A1-A20). The court of appeals recognized that this Court's decision in *Lutheran Synod* left open the questions whether, and in what circumstances, the usual fair market value measure of compensation may be superseded by a substitute facilities cost measure when publicly owned property is taken (Pet. App. A6-A7). The court also recognized that the substitute facilities doctrine has generally been applied to taking of "streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined" (*id.* at A8-A9). And the court acknowledged (*id.* at A9 (footnote omitted)):

> [t]his is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.

Nevertheless, the court of appeals concluded that "the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property" (Pet. App. A9). Reasoning from the "indemnity principle" underlying the Fifth Amendment Just Compensation Clause, the Court concluded that petitioner would not be made whole unless reimbursed for "the amount

of money reasonably spent in [its] venture to create a functionally equivalent facility" that it was obliged to establish (*id.* at A10-A11).[4]

The court of appeals recognized (Pet. App. A13) that in *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (1964), the Eighth Circuit had "apparently reached a different conclusion," holding that the cost of substitute facilities was an improper measure of compensation for the taking of publicly owned property where the market value of that property was ascertainable. But the court below insisted that its decision "creates no conflict" because it believed that a district court finding in *South Dakota Game, Fish and Parks Department* that it was necessary to replace the property taken there, was "highly suspect" (Pet. App. A13-A14). In addition, the court below believed that language in an intervening Eighth Circuit decision, *United States* v. *3,727.91 Acres of Land*, 563 F.2d 357, 359 n.2, 360 (1977) (*Elsberry Drainage District*), cast doubt upon the Eighth Circuit's continued adherence to the rule reflected in its earlier decision (Pet. App. A13-A14).

b. The court of appeals also rejected the district court's alternative holding that petitioner had not met its burden of proving the cost of a functionally equivalent substitute facility. By presenting testimony as to the cost of acquiring and developing its substitute site, and testimony that the entirety of the substitute site had been acquired in order to avoid severance damage claims that petitioner believed would be costly, petitioner had met its burden of going forward with evi-

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[4] The court of appeals assumed for the purpose of its analysis that replacement of petitioner's landfill facility was either a legal or practical necessity, but left open for consideration on remand the question whether this was, in fact, so (Pet. App. A10 & note 6).

dence of the cost of substitute facilities, the court held. Pet. App. A14.

Nevertheless, the court of appeals did not direct entry of judgment based upon the jury's alternative verdict. The court observed that the substitute site acquired by petitioner was substantially larger in area and usable to a greater depth, and accordingly could be expected to serve petitioner for a far longer time, than its former site that had been acquired by the government (Pet. App. A15). The court of appeals held that the district court's instructions defining the substitute facilities measure of compensation (see page 5 note 2, *supra*) "did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (Pet. App. A15-A16) and that a remand for retrial accordingly was required. The precise manner in which such a deduction was to be made was left open for determination on remand (*id.* at A17 & n.9).[5] The court stated that petitioner "is entitled to re-

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[5] The court suggested that one permissible method of making this adjustment would be to deduct from the cost of substitute facilities a fraction of the total equal to "one minus the ratio that the remaining useful life of the condemned [property] bears to the useful life expectancy of the substitute facility" (Pet. App. A17 n.9, quoting *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 n.11 (2d Cir. 1968)).

Also remanded for redetermination was the question of the interest rate to be paid upon any deficiency ultimately determined to be due. The court of appeals reasoned that, because a remand was in any event necessary, petitioner should be allowed another opportunity to present evidence on the interest issue (Pet. App. A19-A20). Applying its prior decision in *United States* v. *329.73 Acres of Land*, 704 F.2d 800, 812 (1983) (en banc), the panel also ruled that interest was not to be limited to the 6% rate specified in the Declaration of Taking Act (Pet. App. A19). See page 6 note 3, *supra*. And reasoning that "the proper interest rate is an element of 'just compensation,'" the court of appeals directed that the interest rate issue be submitted to the jury upon remand (Pet. App. A20).

imbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill" (*id.* at A18). The court cautioned that "[w]hether the price actually paid [by petitioner for its new site] is reasonable under the circumstances is for the jury to decide" (*ibid.*).

ARGUMENT

Asserting that the United States did not make a timely objection thereto, petitioner contends that the court of appeals lacked authority to consider the adequacy of the district court's instructions to the jury defining a substitute facilities costs measure of compensation. This claim does not warrant this Court's review.

1. We note, at the outset, that the record does not support petitioner's assertion that the United States failed to make a timely objection to the district court's instructions defining a substitute facilities costs measure of compensation. Of course, as indicated above (pages 3-5), the primary thrust of the government's legal argument throughout these proceedings was that petitioner is not entitled to have its compensation measured by the actual cost of the replacement facility it acquired. But the government also consistently made clear that if a substitute facilities measure were to be employed, petitioner's actual expenditures would have to be adjusted downward to reflect the fact that the substitute landfill acquired by petitioner was considerably more valuable than the property taken. For instance, the government's memorandum in support of its motion in limine (see page 3, *supra*) states (R. 75):

> Duncanville does not limit their claim to a cost reproduction (less depreciation) evaluation of [the condemned property], which obviously should set the maximum recovery even under the substitute [facilities] theory * * *.

The district court's pretrial order faithfully reflects the "fall-back" position of the United States (R. 135):

> 10. In rebuttal to the claim of the City for the cost of substitute facilities, the United States contends, without waiving its position that such is not applicable, that the cost for such substitute facility in this case * * * [may in no event exceed] the cost to provide functionally equivalent acreage and/or capacity for the net remaining usable acreage for landfill purposes of [the property acquired by the United States] * * *.

Nor, contrary to petitioner's assertion (Pet. 4), did the government fail to make its position clear at the time the jury was instructed.[6] At the conclusion of closing arguments by counsel, the district court instructed the jury. The instructions given orally at this juncture were identical in material respects to those reproduced at page 5 note 2, *supra*, except that the word "reasonable" that qualifies the term "cost" in the version printed above, was not part of the instructions (see Tr. 488-489). The jury was then discharged for the day and instructed to commence deliberations the next morning (Tr. 495).

After the jury had retired, the court entertained formal objections to the instructions given (Tr. 497). The Assistant United States Attorney commenced by invoking the points previously stated in support of the government's motion in limine (Tr. 497-498).[7] Second, the government argued that there was, in any event, no evidence in the record to justify giving a substitute facilities instruction because petitioners had not shown that

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[6] Of course the government had previously requested that the jury be instructed that it should not consider the cost of a substitute facility in its deliberations (R. 118), and that fair market value is the proper measure of compensation (R. 115).

[7] As indicated above, among the arguments made in support of the motion in limine was that a substitute cost measure, if permissible, had to be limited so as to reflect only the cost of a truly equivalent facility, less depreciation of the facility taken (see page 10, *supra*).

the expenses they incurred were reasonable, but only that they had been incurred (Tr. 498). Finally, the United States objected explicitly to the substitute facilities instructions given on the ground that the jury was not required to find that "the costs that were actually paid were reasonable and necessary" (Tr. 498-499). Government counsel explained (Tr. 499) that the instructions given

> would lead the Jury to think that whatever [petitioner] paid would be a proper amount. I think that's what's been argued to them, whatever [petitioner] paid the Government is bound to reimburse them if they paid it and if this is a proper measure.[8]

The court took the government's objections under submission overnight, promising a ruling in the morning (Tr. 500-501). While the trial transcript does not reflect this event, it appears that the district court decided to respond to the government's objections by inserting the word "reasonable" into the text of the instructions previously given orally in two places (as indicated at page 5 note 2, *supra*). The revised instructions apparently were transmitted to the jury in writing, along with a signed instruction from the court stating (R. 202):

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[8] It appears that the government's concern was based in part upon petitioner's closing argument to the jury. Petitioner's counsel stated (Tr. 464) (emphasis added)): "You've got two questions, one is, what is the market value, and one is, *what the City spent.*" Petitioner's counsel also commented (Tr. 466 (emphasis added)):

> [The government] says we didn't offer any evidence as to the fair market value of the [replacement] site [acquired by petitioner]. Well, we offered evidence of what we paid for it. *And you will note the Court doesn't ask you to find the fair market value of the [substitute] site.* If the Court wanted you to answer that question, the Court would ask you that. The Court didn't. And we knew the Court wasn't so why should we offer evidence on something we knew the Court wasn't going to ask.

> Changes have been made to the instructions regarding Cost of Substitute Facilities. Please reread this page of the Charge.

Thus, assuming compliance with Fed. R. Civ. P. 51 were the controlling consideration here, the government substantially complied with the mandate of the Rule, by contemporaneously objecting to the instructions given.[9]

2. Even if, as petitioner charges, the government had not complied with Fed. R. Civ. P. 51, the action of the court of appeals would be wholly unobjectionable. In considering petitioner's contrary arguments it is important to contrast the procedural posture of this case on appeal, to the typical situation in which Rule 51 is applicable to limit the scope of issues upon appeal. *The government prevailed in the district court.* It was not in the position of urging upon appeal that the judgment of the district court be reversed for reasons that the district court had no opportunity to consider.[10] Rather,

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[9] Petitioner apparently faults the government (Pet. 9) for failure to renew its objection after the court had added the word "reasonable" to the instructions previously given. No authority for this hypertechnical application of Rule 51 is cited. Moreover, the record does not reveal that any proceedings were held in open court following amendment, in writing, of the jury instructions, prior to the time the verdict was returned, at which a contemporaneous objection could have been made. In any event, as explained below, even if noncompliance with Rule 51 were established, the court of appeals acted entirely within its authority.

[10] Of course, even if the government were deemed to have failed to comply with Rule 51, the district court was plainly apprised of the government's position on the very issue upon which the court of appeals remanded (see pages 10-12, *supra*). In the circumstances, the court of appeals would have been free to reach the adequacy of the substitute facilities instructions even at the urging of the government on appeal. *Brown* v. *AVEMCO Investment Corp.*, 603 F.2d 1367, 1373 (9th Cir. 1979).

the government was the appellee, urging affirmance. Moreover, for tactical reasons, the government did not even urge the inadequacy of the substitute facilities instructions upon appeal as an alternative ground for affirmance or in opposition to petitioner's claim that judgment should have been entered based upon the jury's alternative verdict. Rather, the court of appeals reached this issue sua sponte.[11] The government accordingly cannot be faulted for noncompliance with Rule 51, which provides, that "[n]o *party* may assign as error the giving or the failure to give an instruction" unless he makes a timely and specific objection (emphasis added).

And, significantly, the court of appeals, in reaching the adequacy of the instructions given on the substitute facilities cost standard, was *not* venturing outside the area of the dispute framed by the parties' arguments both in district court and the court of appeals; petitioner accordingly may not claim that it was unfairly surprised by the court of appeals' ruling. Although the court of appeals addressed the substitute facilities costs instructions sua sponte, its decision to do so, and the ground upon which it remanded for modification of those instructions and retrial, are intimately interrelated with the arguments made by the government on appeal in support of the district court's judgment, based upon its ruling that fair market value is the proper measure of compensation. Thus, consistent with its argument in the district court, the government argued on appeal that use of a substitute facilities costs measure would confer a substantial windfall upon petitioner, because its substitute landfill was larger and more valuable than the facility replaced (U.S. Br. 25-27).[12]

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[11] Thus petitioner's assertion (Pet. 4) that the government failed to comply with Fed. R. App. P. 28 is frivolous.

[12] The argument was offered, in part, in support of the district court's alternative holding (see page 6, *supra*) that petitioner had not met its burden of establishing the reasonable cost

The court of appeals obviously found considerable force in that argument, but did not believe it dictated the disposition the government sought—rejection of the substitute facilities cost standard. Instead, the court of appeals held that refinement of that standard was required. In the circumstances, that disposition plainly was not in excess of the court of appeals' authority.

3. Petitioner's submission necessarily rests upon the view that an appellate court has no power to reach an issue not raised or preserved by a party, even though that issue is central to a just and complete resolution of a case and issues properly before the court. Unsurprisingly, petitioner cites no authority for such a radical proposition; and it is plainly unsound. 28 U.S.C. 2106 authorizes this Court and the courts of appeals to

> affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, *and* [*to*] *remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances* [emphasis added].

And Rule 51 does not limit the authority of a court to entertain an issue even if, because of noncompliance with the Rule's requirement, a party has no *right* to raise the issue, especially when consideration of the issue is necessary to resolution of the case. See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Moreover, this Court has repeatedly made it clear that it is authorized in appropriate cases to notice the errors of lower courts, "to which no exception has been taken, when they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,'" *Connor* v. *Finch*, 431 U.S. 407, 421 n.19 (1977) (quot-

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of a functionally equivalent substitute facility.

ing *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941); cf. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981). Because the very reasoning that led the court of appeals to reject the government's argument in support of the judgment of the district court also led it inexorably to recognize that entry of judgment based upon the alternate jury verdict would work a manifest injustice to the United States (see page 15, *supra*), it was proper for the court of appeals to remand for further proceedings here.[13]

4.a. For the foregoing reasons, this case simply does not present any question about the availability of a plain error exception to Fed. R. Civ. P. 51, much less any occasion to resolve an alleged conflict among the circuits concerning the availability of such an exception. In any event, the courts of appeals have recognized that in appropriate circumstances jury instructions may be reviewed, upon appeal, for plain error, even though no party has objected to them. See, *e.g.*, *Carrillo* v. *Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir.), cert.

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[13] We assume for the purpose of this discussion that, contrary to our position in *United States* v. *50 Acres of Land*, No. 83-____, filed concurrently with this brief, the court of appeals' ruling that substitute facilities costs are an available measure of just compensation is correct. Of course, if we prevail in our own petition, the instant petition would become moot. Because the issues in the two petitions are unrelated, however, and because the issue raised by the City plainly warrants no further review, we submit that it would be appropriate to deny the City's petition without awaiting disposition of our own. We note that the City has not challenged the court of appeals' conclusion that, in applying a substitute facilities measure of compensation, the award must be adjusted to reflect the benefits accruing to the condemnee from the substitute facility. Petitioner raises only the procedural question.

denied, 423 U.S. 1014 (1975); *MacEdward* v. *Northern Electric Co.*, 595 F.2d 105, 109-110 (2d Cir. 1979); *Miller* v. *Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979); *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980); *Batesole* v. *Stratford*, 505 F.2d 804, 808 (6th Cir. 1974); see also 9 Wright & Miller, *Federal Practice & Procedure*, § 2558, at 672 nn.40, 41 (1971). Nor, contrary to petitioner's assertion (Pet. 5), is the rule in the Ninth Circuit to the contrary. Despite language in some earlier Ninth Circuit decisions, the recent decisions of that court recognize that an appellate court is empowered, in proper cases, to review the adequacy of jury instructions even though the party harmed by the instruction has not objected. See *Brown* v. *AVEMCO Investment Corp.*, 603 F.2d at 1370-1375; *Wellman* v. *Jellison*, 593 F.2d 876, 878 (9th Cir. 1979); *Robinson* v. *Heilman*, 563 F.2d 1304, 1306 (9th Cir. 1977).

b. Petitioner also claims (Pet. 7-9) that the court of appeals failed to adhere to its own decisions that condition the availability of review under the plain error doctrine upon a showing that a miscarriage of justice has occurred. The asserted intra-circuit conflict in no event warrants this Court's review. Moreover, because, as we have explained above (pages 10-16, *supra*), the court of appeals did not need to rely upon (and did not invoke) the plain error doctrine, petitioner's contention is without substance.[14] In any event, because the court of appeals recognized that to direct entry of judgment upon the alternate verdict rendered based on the district court's substitute facilities instructions might confer a wholly unjustified windfall upon petitioner at the

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[14] Sua sponte review is not limited by the contours of the plain error doctrine, whatever they may be. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 256.

expense of the public fisc, reliance upon the plain error rule would not have been impermissible.

CONCLUSION

The petition for a writ of certiorari should be denied.[15]

Respectfully submitted.

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[15] See page 16 note 13 *supra*.